

## § 655.104

## 20 CFR Ch. V (4-1-02 Edition)

effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

### § 655.104 Determinations based on acceptability of H-2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H-2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H-2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101-655.103 of this part. If the RA determines that the application does not meet the requirements of §§ 655.101-655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a

copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20

calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by § 655.101 of this part within the time available for such purposes.

[42 FR 45899, Sept. 13, 1977, as amended at 59 FR 41875, Aug. 15, 1994]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, § 655.104(e) was amended by removing in the two places it appears the phrase "20 calendar days" and adding in each place the phrase "30 calendar days" in lieu thereof, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

#### § 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H-2A application meets the requirements of §§ 655.101-655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts

in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H-2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer, during the period after filing the application and before the date the H-2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such